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STUDIES IN ENGLISH CIVIL PROCEDURE.*

II. THE RULE-MAKING AUTHORITY.

VI.

The Schedule of 1875 does not purport to be a complete code of procedure. Its framers had in view certain specific ends for which the schedule was added to the Act, and it was not intended to do more than accomplish them. In the first place, it was desired to wipe out the many differences which had made the procedures of the various old courts as strange to each other as those of foreign countries; in the second, there were to be added to the new uniform procedure certain definite facilities strongly favored by the Judicature Commissioners in their first report. These were the limits within which the new rules were to operate. Outside them, the old procedure was to remain, as the act expressly required.¹¹⁴

A definite body of raw materials, out of which they should work up their composition, was thus placed in the hands of the draftsmen who were charged with the duty of preparing the rules. They had before them the practice of the common law courts, as directed in the Common Law Procedure Acts and the Rules of Court made under them;¹¹⁵ on the equity side there were the Chancery Practice Amendment Acts and the Consolidated General Orders of 1860;¹¹⁶ there were also concrete sets of rules in the courts of probate and admiralty.¹¹⁷ Without actually codifying the several thousand sections of adjective law before them, they selected such of them as would fit properly into the new scheme, and rearranged them according to what, in the conduct of an action, would be as nearly as possible chronological sequence. To these sections which were repeated *verbatim* out of the old Acts and rules they added another lot of old sections

*Continued from the January issue, 63 UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 182.

¹¹⁴ §21.

¹¹⁵ Collected in Day: Common Law Procedure Acts.

¹¹⁶ Annotated in Morgan: Chancery Forms and Orders.

¹¹⁷ The Admiralty Rules of 1859 and the Probate Rules of 1862. The new Rules were not to affect divorce proceedings.

in which slight alterations were necessary, either in the substance or in the form of expression. Then were added the sections containing the entirely new matter they were instructed to include. The whole amounted to four hundred and fifty-six rules, which were divided up into sixty-three orders, each dealing with one general subject and containing from one to thirty-four rules.¹¹⁸ Of these nearly a half are repeated from former statutes or regulations, *ipsissimis verbis* or with slight alterations.¹¹⁹ The great virtue of the rules thus formulated was that they would apply to all divisions of the new court. An old common law rule, repeated in the schedule, would apply not only to an action proceeding in the Queen's Bench Division of the High Court, but equally to an action in the Chancery Division if the same question of practice arose. In some instances the repeated rules applied principally to business which would remain, as it was before, in the common law or the equity side of the court, but frequently conflicting procedural methods were smoothed into uniformity by merely adopting the old rule out of one practice or the other.¹²⁰ The net result was that the schedule completed the so-called fusion of law and equity by exchanging in their procedures some of the rigor of one for some of the freedom of the other, with the least possible amount of anything which might be a complete innovation to both.¹²¹

¹¹⁸ This was the form of the old Orders in Chancery.

¹¹⁹ About two hundred and ten Rules.

¹²⁰ For instance, in the Rules on Execution.

¹²¹ Commending this attitude, the ever-watchful SOLICITORS' JOURNAL said (19 SOL. J. 252, February 6, 1875): "The Act itself makes provisions containing the greatest possible capacity for leaving things pretty much as they are, combined with the greatest possible capacity for ultimately making great alterations. . . . The new Rules seem to proceed upon a similar method. The intention is that the old system shall transmute itself in working into the new, the direction and manner of its change being shaped and guided by the exigencies of the occasion and by practical experience. A procedure cannot, any more than a constitution, be born full grown. . . . Any change must be initiated and worked out by the present practitioners as best it can. The new rules must not fit too tightly at first and in some respects must be left to be shaped by experience. It must be remembered, too, that it is a difficult thing to embody what is very much in the nature of an alteration of the spirit of a procedure in distinct specific rules."

These are sentences that might be profitably read by rule-makers outside of England as well.

A brief survey of the sixty-three orders in the schedule will illustrate this clearly. They are here divided into five groups, for convenience of treatment.

The first fifteen orders deal with the preliminary steps in an action, carrying the matter to the point where appearance has been entered or, for want of one, the plaintiff has taken his judgment. Their general effect is to make the common law procedure apply to the opening of hostilities in all divisions of the High Court.

The opening rules¹²² throw every litigation, whether at common law, in equity, probate, or admiralty, into the form of an "action," begun by writ of summons. This marks a great change, especially in equity, admiralty, and probate procedure, from which bill, information, cause *in rem*, citation and other picturesque names are thus deleted.¹²³ A blank form for the writ having been given in the appendix,¹²⁴ four orders¹²⁵ go on to describe what information must be given in it as to the identity of the parties and of their causes of action. The substance of the latter is to be contained in an "indorsement" on the back of the writ—a short "statement of the nature of the claim made, or of the relief or remedy required in the action." This rule completes the gradual disappearance from the pleader's armory of those curiously wrought weapons devised by the early clerks in chancery, out of whose ingenuity sprang the whole romance of *assumpsit* and the other descendants of Westminster the Second.¹²⁶ But, though the identity of all the old writs is now

¹²² Order I, Rule 1, and Order II, Rule 1.

¹²³ At this point the subject of an interpleader proceeding, which is not begun by writ of summons, is treated of in Order I, Rule 2. Interpleader applications will be granted in any case where either the old equity or law courts would have granted them, after service of a writ and before defence pleaded.

¹²⁴ Appendix A, Part I.

¹²⁵ Orders II, III, IV and VII.

¹²⁶ The Uniformity of Process Act, 1832, introduced a uniform writ of summons for all personal actions, which stated in an indorsement the nature of the action, *e. g.*, debt, trespass, *etc.* The Real Property Limitation Act, 1833, abolished all but three of the old real and mixed actions. The Common Law Procedure Act, 1852, reduced all writs of summons to three: one for use in all personal actions, making no mention at all of the cause of action, containing merely a summons to appear; another in replevin; and a third in ejectment, which made uniform the writ in the remaining real actions. The

merged into the single form, four distinct classes of indorsements are provided for, each to be followed by a different line of attack. Unliquidated claims are to be briefly described in a "general indorsement," leaving more detailed information to be supplied in a statement of claim delivered after appearance; liquidated claims may be "specially indorsed," in which case no further statement of claim need be made; the special indorsement peculiar to actions founded on negotiable instruments, instituted in 1855,¹²⁷ is retained; and in cases where an accounting must precede the determination of rights, the plaintiff must ask for it on his writ so that an order for an account may issue at once upon the defendant's appearance.¹²⁸ Of these four, the general indorsement was quite new; the others had been in use before, either in equity or at law.¹²⁹ Three orders¹³⁰ regulate the formal issue of the writ from the court office, the issue of concurrent writs and the renewal of writs after a lapse of time.¹³¹

Three orders are then devoted to the requirements for proper service. Apart from a few new provisions as to service

1875 Rule assimilated replevin and ejectment to personal actions, making universal a single form of writ and restoring the indorsement to inform the defendant what was claimed.

¹²⁷ Under the Summary Procedure on Bills of Exchange Act, 1855. If the plaintiff sued on a promissory note or bill of exchange, he would indorse on his writ a copy of the instrument and allow credit for any payments made. The defendant would then not be allowed even to appear to the writ unless he showed, on affidavit, that he had a defence on the merits.

¹²⁸ Such order will issue of course unless the defendant shows there is some preliminary question to be tried. Order XV, Rule 1. This merely extended the former Chancery practice to the Common Law side, although the advantage of a simple indorsement on a writ over the old bill in equity is obvious. This departure was recommended by the Judicature Commissioners.

¹²⁹ The "special indorsement" of liquidated claims, allowed by Order III, Rule 6, is a slight extension of §25 of the Common Law Procedure Act, 1852. Besides doing away with the necessity for a statement of claim, it had the virtue of allowing the plaintiff to obtain final judgment at once if the defendant failed to appear. When the writ was "generally" indorsed he had to have his damages assessed on writ of inquiry before he could get final judgment.

¹³⁰ Orders V, VI and VIII.

¹³¹ The Rules as to concurrent writs and renewal of writs are copied from §§9, 11, 13 and 22 of the Common Law Procedure Act, 1852, with the life of the writ put at twelve months instead of six. A "concurrent" writ is a duplicate to facilitate service where there are several defendants.

upon defendants under disability¹³² they are principally an adaptation of the existing rules.¹³³ The two departments from which inconsistencies are removed are substituted service¹³⁴ and service out of the jurisdiction. The latter phrase comes as a shock to American ideas of jurisdiction for service, but there is a list of cases given in the order¹³⁵ in which it is permitted, and there are rules in which the necessary steps are explained. Appearance is the next subject mentioned; most of the rules in the two orders devoted to it repeat parts of the old rules with some slight changes.¹³⁶ Finally, an entirely new order, the famous Order XIV, extends and makes more elastic the recovery of summary judgment in any case where, after appearing to a writ specially indorsed (therefore, on a liquidated claim) the defendant fails to convince the court, on affidavit, that his defence on the merits is sufficient to warrant his being given leave to defend.¹³⁷

¹³² Order IX, Rules 3 to 6 cover service on a wife, an infant, a lunatic and a partnership.

¹³³ The following old rules are repeated, in whole or in part, in Orders IX, X and XI: §§15, 16, 17, 18, 19 and 170 of the Common Law Procedure Act, 1852; Rule 3 of Hilary Term, 1853; Chancery Order X, Rule 7; Rule 170 of the Admiralty Rules, 1859; and Rules 18 and 19 of the Probate Rules, 1862.

¹³⁴ In England service is effected by the parties, not by a court officer. "Personal service" is handing the defendant a copy of the writ and showing him the original if he wishes to see it. "Substituted service" is usually by publication and is ordered by the court only when efforts to make personal service within the jurisdiction are unavailing. The Pennsylvania method of allowing service upon a member of the defendant's family or household is not in use.

¹³⁵ Order XI, Rule 1. Previously, under Chancery Order X, Rule 7, the Court of Chancery had discretionary power to order service out of the jurisdiction in any case whatsoever. The Rules of 1875 adopted the limitations of the common law rules, §§18 and 19 of the Common Law Procedure Act, 1852, slightly enlarged. This power to effect service out of the jurisdiction counterbalances, to some extent, the lack of anything like foreign attachment proceedings in the High Court.

¹³⁶ The following old Rules are repeated, in whole or in part, in Orders XII and XIII: §§27, 28, 29, 30, 33, 172, 173, 174, 177 of the Common Law Procedure Act, 1852; Rules 2, 3, 113 of Hilary Term, 1853. The chief innovations are that partners, though sued in their firm name (as allowed by Order XVI, Rule 10) must appear personally; and that a plaintiff need not file a statement of claim if a defendant fails to appear to a writ "generally" indorsed, but may sign interlocutory judgment and proceed to assess his damages by writ of inquiry.

¹³⁷ This summary judgment was previously possible only under the Act of 1855 mentioned in note 127, *supra*. Order XIV extends it to all claims specially indorsed and allows the judgment to be for part or whole of the claim, and against less than all the defendants. In this respect, it corre-

If the 1875 Schedule were divided up into chapters, the next fifteen orders might be grouped together under the heading of Parties and Pleadings. These are the most vital in the schedule, as they introduce into actions at law equitable notions about the joinder of parties and of causes of action, and impose upon the procedure in equity in that connection some of the exactitude and brevity which has always been the redeeming virtue of pleading at common law. Later amendments have made some alterations in these fifteen orders, but they still remain¹³⁸ the heart of the whole body of English legislation on procedural reform.¹³⁹

Three of them relate to parties.¹⁴⁰ They allow all persons to be joined in whom or against whom "the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative."¹⁴¹ Parties may be so brought in who are interested in only a part, if not the whole, of the cause of action; they may be freely brought in or struck out after the action has commenced, even as late as the trial itself, by any party to the writ, and the greatest liberality is allowed as to substitution. Equally elastic are the judgments to be pronounced; they may affect some or all of the parties, and all or part of the property in dispute. These rules enlarge greatly the old common law powers¹⁴² and add to the Chancery powers that of dealing with the mutual rights of particular persons singly as well as in the whole controversy. Two innovations worthy of especial note are the right

sponds somewhat to the Pennsylvania judgment for want of a sufficient affidavit of defence. One of its virtues is in the affidavit which is a prerequisite to leave to defend, as ordinary pleadings are not under oath. The leave to defend may be either unconditional or subject to terms such as payment in of all or part of the amount in dispute, or immediate trial by a judge without a jury. This procedure was another of the specific recommendations of the Judicature Commissioners.

¹³⁸ Together with Order XXXVI, relating to modes of trial.

¹³⁹ In the main they carry out recommendations made by the Judicature Commissioners.

¹⁴⁰ Orders XVI, XVIII and L.

¹⁴¹ Order XVI, Rules 1 and 3.

¹⁴² §§19 to 21 of the Common Law Procedure Act, 1860, provided that all persons who were "supposed to have a right" could join as plaintiffs, and be struck out if proper, but even that was restricted within the limits of joint contractual rights. As to substitution, the old Common Law courts could add or strike out parties, but they would never substitute.

given a plaintiff to join two or more defendants if he "is in doubt as to the person from whom he is entitled to redress,"¹⁴³ and the "third party procedure" by which a defendant may bring in as a third party primarily liable any person from whom he "is, or claims to be, entitled to contribution or indemnity, or any other remedy or relief" in connection with the subject matter of the action.¹⁴⁴ Both of these have worked wonders in avoiding multiplicity of actions and expenditure. In the rules as to capacity of parties a striking novelty is the provision that partnerships may sue and be sued in their firm names.¹⁴⁵

A single order suffices to proclaim the new creed as to joinder of causes of action. As with every new religion, its foundation is in its new point of view. The test is no longer the form of the writ or the nature of the right involved, but the purely empirical one of the convenient trial of the issues to be raised. The rule allows all causes of action to be united in the same claim except such as "cannot be conveniently tried or disposed of together."¹⁴⁶ Undoubtedly this pronouncement has been equally as potent as the one unifying all the writs of summons, in breaking down the walls between the forms of action. It is also specifically provided in the order that parties may join their own several claims with actions begun on a joint obligation, and that they may join individual claims with demands sued on in a representative capacity.¹⁴⁷ Subject to the risk of having separate trials ordered where causes are inconveniently joined, this

¹⁴³ Order XVI, Rule 6. This right is, of course, subject to an obligation on the plaintiff to pay the costs of any person who is cleared of liability. "Costs," it should be remembered, are a real compensation in England, as they include counsel fees.

¹⁴⁴ Order XVI, Rules 17 to 21, carrying out §24 (3) of the Judicature Act, 1873. This was another of the Commission's recommendations.

¹⁴⁵ Order XVI, Rule 10. Although partners so sued must appear in person, Order XII, Rule 12, and partners so suing must, on demand, disclose their individual names, Order VII, Rule 2.

The other Rules on capacity (Orders XVIII and L) are principally an adaptation of existing rules, under §§135 to 142 of the Common Law Procedure Act, 1852, §92 of the Common Law Procedure Act, 1854, §§42 and 52 of the 15 & 16 Vict., c. 86, and Chancery Order XXXII, Rule 1.

¹⁴⁶ Order XVII, Rule 1.

¹⁴⁷ Except in the case of a trustee in bankruptcy, Order XVII, Rule 3.

allows parties an almost unlimited latitude they never before enjoyed.¹⁴⁸

Having declared the new doctrine of parties and causes, the rest of the orders in this group cover the practical subject of pleadings. Order XIX, entitled Pleading Generally, has become the English pleader's *vademecum*; every student at the Inns is enjoined to commit its principal rules to memory. Beginning with the general admonition that "statements shall be as brief as the nature of the case will admit," they go on to stipulate that "every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved," and to describe particularly certain matters (like malice, fraud, notice, *etc.*) which may be briefly alleged as facts, and certain other matters (like denials of material allegations) to support which the pleading must be full. Sufficient description is given of the forms required, and this is supplemented by the presence of a number of specimen pleadings inserted in the Appendix. The former common law rules as to amendment and the pleading of new matter arising after action brought were generous, and these are repeated.¹⁴⁹

Then the successive pleadings in an action are taken up *seriatim*, in separate orders. First is the Statement of Claim. Its form and contents are, it is true, determined by Order XIX, but Order XX fixes the time for its delivery¹⁵⁰ in various actions, al-

¹⁴⁸ §41 of the Common Law Procedure Act, 1852, had allowed the joinder of all personal claims between the same parties suing in the same right, but this extended the liberty to include actions to recover property, and actions based on any right at all. The check of convenience of trial was a much easier one than the old equity test of multifariousness. It was adopted from the Act of 1852.

¹⁴⁹ Order XX, as to pleading new matter, copies §§68 and 69 of the Common Law Procedure Act, 1852, and Rules 22 and 23 of Trinity Term, 1853. Order XXVII, on amendment of writ and pleadings, amplifies §222 of the Common Law Procedure Act, 1852, §96 of the Common Law Procedure Act, 1854, §36 of the Common Law Procedure Act, 1860, Chancery Order IX, Rules 17 and 24, and Chancery Order XXXIII, Rule 11, by providing that any pleading may be amended at any time: once without obtaining leave, and again after that with leave of the court—subject to the other party's right to object.

¹⁵⁰ Pleadings are merely delivered to each other by the parties. They are not filed of record until judgment is entered, when a copy of all the pleadings is filed in the Central Office.

lows the defendant to waive a statement of claim,¹⁵¹ and provides that a special indorsement shall be equivalent to a statement of claim.¹⁵² The defendant's response to this document is called his Defence, the time and occasion for which are next prescribed.¹⁵³ Here, however, further directions than the general rules of Order XIX were necessary, to describe the newly enlarged privilege of counterclaim,¹⁵⁴ whereby a defendant could set up in his defence any right or claim on which he could have founded a separate action against the plaintiff. Such a counterclaim is to be treated in all respects as a cross-action. If there is no counterclaim pleaded, there would, in an ordinary case, be no further pleadings, but where a counter-claim is put in the plaintiff is entitled to deliver a reply,¹⁵⁵ which corresponds exactly to a defence to a statement of claim. Any pleadings subsequent to reply may be delivered only by leave of the court.¹⁵⁶ To solidify this structure of pleadings, the common law demurrer is retained; it is provided that any party may demur to any part of any pleading.¹⁵⁷ But demurrers were soon abandoned altogether by the rule-makers¹⁵⁸ for the more intelligible "objection in point of law."

Two orders describe the procedure to be followed if either side does not wish to go on with its case. A plaintiff may discontinue, but only by leave of the court, upon proper terms as to his opponent's costs and as to any other action being brought.¹⁵⁹ This unifies previous divergencies and is "one of several rules which materially curtail the plaintiff's freedom of control over

¹⁵¹ This provision was later changed, as it was found useless.

¹⁵² See notes 124 and 137, *supra*.

¹⁵³ Order XXII unifies the widely divergent practices of the Common Law courts under §63 of the Common Law Procedure Act, 1852, the Court of Chancery under Chancery Order XXXVII, Rule 4, the Court of Admiralty under Rule 68 and the Court of Probate under Rule 38.

¹⁵⁴ Created by Order XIX, Rule 3, under §24 (3) of the Judicature Act, 1873.

¹⁵⁵ Order XXIV.

¹⁵⁶ The rules as to delivery of pleadings with or without leave have been greatly altered since 1875.

¹⁵⁷ Order XXVIII.

¹⁵⁸ In 1883, when the whole body of Rules was revised.

¹⁵⁹ Order XXIII.

the conduct of the cause, and leave him much less fully *dominus litis* than he was before."¹⁶⁰ The other covers default of pleading.¹⁶¹ It penalizes a failure to defend, by judgment final or interlocutory according to the nature of the claim, against some or all of the defendants, and also prescribes the penalties for default at any subsequent stage in the proceedings.

Now follows a group of orders dealing with interlocutory matters which in England are roughly described as Chamber Work, and are under the supervision of the masters, who have most of the powers of a judge at chambers. Except in one regard,¹⁶² they repeat substantially the existing practice of the common law courts, laying it down for the future guidance of all divisions of the High Court, with some improvements in detail. Of the thirteen orders in this group, three as to payment into court, admissions on the record, and the putting of a case stated show the least deviation from the previous practice.¹⁶³ Four orders reflect the equitable spirit implanted into all divisions of the court; one¹⁶⁴ confers upon the court power to enlarge, for good cause, the time appointed in the rules for the doing of any act, before or after it has expired; another¹⁶⁵ declares that non-compliance with any of the rules shall not render a proceeding void, but merely subject to be set aside or amended on proper terms; a third allows the court to make all orders neces-

¹⁶⁰ Wilson: *Judicature Acts* (1st ed., London, 1875), p. 221. Another of importance is Order XLI, Rule 6, for which see note 183 *infra*. Another is Order XXXVI, Rule 4, which allows the defendant to enter the action for trial if the plaintiff fails to do so within the appointed time.

¹⁶¹ Order XXIX is built up out of the common law rules in §§93 and 94 of the Common Law Procedure Acts, 1852.

¹⁶² The newly extended powers of appointing receivers and granting injunctions on the common law side of the court.

¹⁶³ Order XXX, on payment into court, reproduces, modified, §§70, 72 and 73 of the Common Law Procedure Act, 1852 and Rule 11 of Hilary Term, 1853.

Order XXXII, on admissions, is nearly identical with §§117 and 118 of the Common Law Procedure Act, 1852, Rule 29 of Hilary Term, 1853, Chancery Rule 7 under the 21 & 22 Vict., c. 27.

Order XXXIV, on case stated, somewhat enlarges the powers exercised by the court under §§46, 47, 179 of the Common Law Procedure Act, 1852, and Chancery Rules 8 and 14 under the 13 & 14 Vict., c. 35.

¹⁶⁴ Order LVII, Rule 6 is one of the most frequently invoked of all the Rules.

¹⁶⁵ Order LIX. Both these are entirely new provisions.

sary for the preservation of rights or property *pendente lite*, or the bringing into court of materials necessary to assist the court in determining the issues before it,¹⁶⁶ and the fourth allows the parties, or the court of its own motion, to consolidate separate actions which can be conveniently tried together.¹⁶⁷ Three more orders¹⁶⁸ describe, in some detail, the procedure to be followed in the making of interlocutory applications—whether they should be by motion, by summons, or by rule to show cause, and whether they should be made in open court or in chambers, or in the district registry. One of these repeats the common law rules as to practice before the masters and slightly enlarges their jurisdiction.¹⁶⁹ The official regulations as to the size and style of paper and printing to be used form the subject of a separate order.¹⁷⁰

But the most important orders in the interlocutory group are two relating to methods of discovery. The old Chancery procedure had always provided a party with ample facilities for obtaining, before the trial, a knowledge of the facts and documents on which his opponent proposed to rely, though by methods provokingly cumbersome.¹⁷¹ The common law courts, too, had a limited power to order discovery, conferred upon them by the Common Law Procedure Acts,¹⁷² which had been found exceed-

¹⁶⁶ Order LII. The court is empowered to order payment in of the amount, or surrender of custody of property, in dispute; the sale of perishable goods; the appointment of a receiver or the issue of an injunction; the inspection of property; the taking of samples; the making of observations or experiments; and if property is withheld not to dispute title, but to enforce a lien, the surrender of the property upon payment into court of the amount of the lien.

¹⁶⁷ Order LI. This is frequently applied in accident cases, where a number of claims arise out of the same act of negligence.

¹⁶⁸ Orders LIII, LIV and XXXV. The last gives full details as to the work to be done by the District Registries created under the Judicature Act of 1873.

¹⁶⁹ Order LIV, repeating with a few additions the rule of Michaelmas Term, 1867, made under the 30 & 31 Vict., c. 68, which created the office of Master in the Common Law courts. In the Chancery Division the "Masters" are the Chief Clerks to the judges, appointed under the 15 & 16 Vict., c. 80, who, in 1897, obtained from the Lord Chancellor the right to be called Masters.

¹⁷⁰ Order LVI. There are also the regulations as to the printing of pleadings, in the earlier Orders on pleadings.

¹⁷¹ Especially roundabout was the old way of administering, through an official examiner, interrogatories which went through the whole Bill like a fine-toothed comb.

¹⁷² §§50, 51, 52, 53 and 54 of the Common Law Procedure Act, 1854.

ingly useful in eliminating unnecessary issues from the trial. To obtain the benefit of the extended principles of the Court of Chancery, and combine with them the simplicity of the common law methods, the framers of Order XXXI devised a combination of the two which enabled any party to ascertain with precision just what he was expected to prove or refute at the trial, and no more. Briefly, the new system provides that any party may, after the first pleadings have been exchanged, deliver to his opponent, without leave, a set of interrogatories requiring sworn answers, and obtain, upon formal request, a sworn list of all relevant documents in his opponent's possession or power. This is supplemented by proper protection to the answering party, which permits him to refuse to answer improper questions and to refuse inspection of any documents for which he can properly claim privilege. The order gives complete details as to the times and methods for requesting this discovery and for enforcing, by penalties, the right to it when refused. Minor defects in the previous practice are, incidentally, repaired.¹⁷³ A further order¹⁷⁴ empowers the court, of its own motion, to direct the making of any inquiries or the taking of any accounts it considers necessary to a proper determination of the rights in controversy.

The first three groups of orders have carried the dispute from the market-place to the door of the court-room. Next in sequence are eleven orders that might be grouped together as the rules on Trial and Judgment. Previous orders made it possible to unite all parties and causes of action in a single proceeding; these give the court power to separate issues not fit to be tried together and to pronounce judgment from time to time on parts as well as the whole of the controversy, on litigants singly as well as in groups. In short, they carry out the principle that the convenience of trial is hereafter to be the test of the limits of action,

¹⁷³ For instance, Order XXXI, Rule 23, permits a party to use only one, or less than all, of the answers he has received to interrogatories. The former common law rule forced him to put in all the answers or none, at the trial, so that frequently he could not safely rely on one answer (which might serve to eliminate a minor issue) for fear of damaging his case by showing the others.

¹⁷⁴ Order XXXIII, based on §66 of the Judicature Act, 1873.

and make that principle widely beneficial by striking improvements in the instruments of trial and judgment.¹⁷⁵

To begin with, Order XXXVI abolishes *venue* and creates a variety of forms of trial. Under it the trial of an action, regardless of its place of origin, may be held in any county where a branch of the court will sit. Before, all trials at law had been before a jury;¹⁷⁶ the new rules make it incumbent on one side or the other to ask for a jury or have the case tried by a judge alone. They also offer the choice of trial before a judge assisted by technical experts (assessors), or before an official or special referee sitting with or without assessors.¹⁷⁷ This is coupled with a power in the court to order that some issues in a cause be tried sooner, and some by a different form of trial, than others, so that the court is entirely free to deal with however complicated a controversy in a logical and efficient way by splitting up the issues and having each one tried by the most competent tribunal. It is further aided by the right to postpone or adjourn a trial whenever necessary.¹⁷⁸ As to the conduct of the trial itself, two orders¹⁷⁹ prescribe the form in which evidence shall be received and affidavits made, and they allow the court in any case, "for sufficient reason," to order that any particular facts may be proved or testimony taken by affidavit.

Coming now to the flexibility of judgments, Order XL allows any party, at any stage of an action, to move for any relief he appears entitled to by admissions in the pleadings, or, if some of the issues have been tried and the rest appear to him unimportant, to move for final judgment. The judge, too, has discretion, at the conclusion of a trial, either to reserve judgment, or-

¹⁷⁵ These innovations were among those most strongly recommended by the Judicature Commissioners in their First Report, and some of them were put into the Judicature Act itself.

¹⁷⁶ §1 of the Common Law Procedure Act, 1854, allowed the trial of issues of fact by a judge without a jury if both parties consented in writing, but such consent was not often given.

¹⁷⁷ The referees were created in §§56 to 59 of the Judicature Act, 1873, with the hope of winning back to the law courts much of the business that was going to arbitration.

¹⁷⁸ Order XXXVI, Rule 24. This rule is copied from §19 of the Common Law Procedure Act, 1854.

¹⁷⁹ Orders XXXVII and XXXVIII.

der it to be entered at once, or order it to be set down for argument before him on points of law.¹⁸⁰ Finally, even if judgment has been entered, an objecting party may move to have it set aside and another judgment entered after argument, without the necessity for a new trial. On such a motion, as well as on a motion for a new trial,¹⁸¹ the court is privileged to order the retrial of separate issues, less than all, and to order the making of any inquiries or taking of any accounts that seem necessary. New trials, however, are sternly discouraged by the rules, which forbid the granting of one on the ground of misdirection, or of the improper admission or rejection of evidence, unless some substantial wrong or miscarriage has been thereby occasioned in the trial of the action.¹⁸² Another old practice broken up is the suffering of a voluntary non-suit, which is made equivalent to a judgment on the merits (unless otherwise ordered by the court), thus barring another action for the same cause.¹⁸³ The complete power given the court over costs, in Order LV, enables it to exercise a most useful control over the proper conduct of an action at all points; the practitioner has ever before him the risk of being ordered to pay his opponent's costs for unnecessary or unfair obstacles raised. This group concludes with a few miscellaneous orders as to the duties of officers of the court and the times of sittings and working hours of the courts and officers.¹⁸⁴

Last group of all "that ends this strange eventful history" is one of nine orders dealing with Appeal and Execution. The order on appeal is necessarily new, as the Court of Appeal was itself a new tribunal, supplanting the former Exchequer Chamber and other appellate bodies; but the eight which cover execution are almost direct transcriptions from the previous rules at common law and in equity. Their repetition in these rules gives the

¹⁸⁰ Order XXXVI, Rule 22.

¹⁸¹ Order XXXIX, Rule 4.

¹⁸² Order XXXIX, Rule 3. No such provision was made in the previous common law rules.

¹⁸³ Order XLI, Rule 6.

¹⁸⁴ Orders LX and LXI. Orders LXII and LXIII, which may be mentioned here, state that these Rules do not apply to divorce, crown, revenue or criminal proceedings, and give the interpretation of technical terms used in the Rules.

equity side of the court the advantages of the common law writs for enforcing its decrees, and adds to the legal powers of execution the equity methods of orders *in personam*.

The salient points of the appeal order¹⁸⁵ are that no appeal may be made without the leave first obtained of either the court below or the Court of Appeal, that all appeals are to be by "notice of motion" stating the ground of the appeal,¹⁸⁶ and that the Court of Appeal is authorized to exercise all the powers of the court of first instance as to considering the evidence and entering or altering final judgment. The order also states the times within which appeals from various orders must be perfected and lays down directions for the whole procedure.

The execution orders are, to a large extent, *verbatim* repetitions of sections of the Common Law Procedure Acts, the Chancery Orders, and the Common Law Rules. They provide for the usual writs—*feri facias*, *elegit*,¹⁸⁷ sequestration,¹⁸⁸ possession,¹⁸⁹ and delivery¹⁹⁰—and retain the special procedure for attachment of the person,¹⁹¹ attachment of debts,¹⁹² and charging orders on shares of stock,¹⁹³ in use in one or other of the old courts. An introductory order codifies the former rules as to the practice on issuing writs of execution, and applies them to all divisions of the new court.¹⁹⁴ There seems to be no

¹⁸⁵ Order LVIII.

¹⁸⁶ Exceptions and writs of error are abolished.

¹⁸⁷ Order XLIII covers these two.

¹⁸⁸ Order XLVII. This is taken from Chancery Order XXIX, Rule 3.

¹⁸⁹ Order XLVIII, for recovery of possession of land.

¹⁹⁰ Order XLIX, for recovery of possession of chattels, since §78 of the Common Law Procedure Act, 1854.

¹⁹¹ Order XLIV. Leave of the court is made a prerequisite to the issue of the writ.

¹⁹² Order XLV applies the common law rules to all Divisions of the High Court by repeating, as 10 Rules, §§60 to 67 of the Common Law Procedure Act, 1854, and §§29 and 30 of the Common Law Procedure Act, 1860.

¹⁹³ Order XLVI extends to all Divisions the former Chancery practice instituted under 1 & 2 Vict., c. 110, §§14 and 15, 3 & 4 Vict., c. 82, §1, and 5 Vict., c. 5, by which shares of stock standing in the books of any company in the name of the judgment debtor could be charged with the debt. Their transfer would then be impossible before payment of the debt.

¹⁹⁴ Order XLII makes a few additions to §§120, 123, 124, 125, 128, 129 to 134 of the Common Law Procedure Act, 1852, Rules 71, 73, 76 and 57 of Hilary Term, 1853, and Chancery Order XXIX, Rule 2.

record of why the diversity in writs of execution was not planed off together with the differences in writs of summons. No mention is made of the subject in the Report of the Judicature Commissioners, and nothing is said about it in either of the Judicature Acts. It must be presumed there was no active dissatisfaction with the methods of execution in vogue, so the procedure was left practically untouched; the authors of the Acts and Rules aimed not at a theoretical perfection of unity, but at the practical correction of existing abuses.

This concludes the survey of the Schedule of 1875. As has been pointed out, it accomplished great reforms, especially in the matters of summons, parties, pleadings and trial, but it was equally tenacious of all that promised well in the existing procedure and let much of it stand, unmentioned.¹⁹⁵ The most remarkable feature of its contents is the large number of what previously were firm statutory mandates which now appear as adaptable rules of court,¹⁹⁶ warmed into life by the touch of judicial discretion. It went into operation with the good will of the profession generally, who were heartily sick of the suspense of the preceding few years, and cleared the ground for the even greater changes which forty years of active husbandry have brought about.¹⁹⁷

VII.

The decade after 1873 was one of glorious uncertainty in the practice of the law. The old court-rooms and their offices looked familiar enough,¹⁹⁸ but everything in them was changed and lawyers trod the mazes of the new procedure warily. No one knew just how far the Judicature Acts were meant to go in the grand scheme of "fusing" law and equity, or what their results would be. Looking back now upon forty years of the new

¹⁹⁵ Numerous points of detail, such as the whole subject of costs. The brief Rule on costs merely gives the court complete power over their distribution among the parties.

¹⁹⁶ Ninety Rules out of the four hundred and fifty-six.

¹⁹⁷ Since the revision of 1883 the annual crop of amendments has averaged twelve in number.

¹⁹⁸ The Common Law Courts continued to sit at Westminster and the Court of Chancery at Lincoln's Inn until the opening of the new Royal Courts of Justice at Temple Bar on December 4, 1882.

dispensation, it is easy enough to see that the substances of law and equity flourish apart, no matter how their procedures are combined,¹⁹⁹ but to their contemporaries the first Judicature Acts seemed to demolish all the old landmarks that bounded the fields of each. The common law pleader anxiously studied up the rambling narratives of the equity draftsman, to learn how he could forget the highly precise and technical art in which he had been bred, and his brother of the chancery bar, with equal trepidation, bade farewell to all those prolix fictions which had made his bills in equity so formidable to the naked eye.²⁰⁰ The outcome "turned out to be the introduction of a mode of pleading so confused and inartistic as to be in many instances only a source of embarrassment and expense."²⁰¹

Then, to make sure he was committing no error, every practitioner took advantage of every privilege allowed him in the Rules in the conduct of an action. He asked for all the discovery and all the amendments and extensions the Rules could possibly warrant;²⁰² where the Rules were not precisely worded, he asked for it just to see what would happen, and there were innumerable places where the terms of the Rules were broadly general. In any case, he would appeal from every adverse decision

¹⁹⁹ Professor Vinogradoff, in his *Common-Sense in Law* (London, 1913, p. 219), points out that there is "a fundamental difference of methods. In one system the centre of gravity lies in the formulated rule, and therefore there is a strong tendency to sacrifice the particular to the general, justice to certainty; while in the other there is a more direct quest after right and a wide discretionary power on the part of the judge to draw on his own notions of what is fair and just." And the English experience enables him to say truly (p. 232) that equity "does not disappear when special tribunals of equity are merged by a comprehensive reform of the judicature."

²⁰⁰ "It was a Bill of this kind," says Mr. Birrell, in *A Century of Law Reform* (London, 1901, p. 182), "which, when it was served upon John Wesley in 1745, drew from him the following observations: 'I called on the solicitor I had employed in the suit lately commenced against me in Chancery, and here I first saw that foul monster, a Chancery Bill. A scroll it was in forty-two pages in large folio to tell a story which needed not to have taken up forty lines, and stuffed with such stupid, senseless, improbable lies, many of them, too, quite foreign to the question, as I believe would have cost the compiler his life in any Heathen Court either of Greece or Rome, and this is equity in a Christian country!'"

²⁰¹ Lord Justice Bowen, in 2 *LAW QUARTERLY REVIEW*, 8 (January, 1886).

²⁰² "The Judicature Acts, in perfecting the machinery of litigation, placed within the reach of every litigant a very complete weapon, but one far too elaborate and precise for the necessities of every case. The first result was to increase by something like twenty per cent. the ordinary expenses of a common law action." (Lord Justice Bowen, in 2 *LAW QUARTERLY REVIEW*.)

in the course of the proceedings, to have the benefit of judicial interpretation of doubtful passages in the Rules at his opponent's expense. Appeals accordingly increased enormously in number.²⁰³ Nor was the distracted suitor relieved to learn that frequently his adviser was utterly nonplussed by the presence unrepealed of dozens of old regulations and statutes on subjects so like those covered by the new Rules that only the authority of a court of appeal could determine which was the correct practice to pursue.²⁰⁴

To add to the general uncertainty, the Rule Committee began to issue sets of amendments to the Rules, and Parliament turned out a string of statutes, that affected nearly every branch of law most used in practice. No less than twelve separate sets of amendments to the Rules were issued between 1875 and 1883,²⁰⁵ and much unnecessary inconvenience was caused by the fact that no prompt notice or publication of their issue was given to the profession. Nearly every year saw a fresh Judicature Act which made some change either in the organization of the Supreme Court or in the course and disposition of appeals.²⁰⁶ But even

²⁰³ Sir Frederick Pollock, in his *Expansion of the Common Law* (London, 1904, p. 15), gives the following description of that time: "Thirty years ago the authors of our Judicature Acts in England, men of the highest eminence, but trained exclusively in the Chancery system, went about to engraft considerable parts of that system on the practice of the Courts of Common Law. What came of their good intentions? Instead of the simplicity and substantial equity which they looked for, the new birth of justice was found to be perplexed practice, vexatious interlocutory proceedings, and multiplication of appeals and costs, so that for several years the latter state of the suitor was worse than the former. Repeated revision of the Rules of Court, and some fresh legislation, was needed before the reconstructed machine would work smoothly."

²⁰⁴ Lord Justice Brett is reported to have said (70 LAW TIMES 127, December 25, 1880), that the Judicature Rules were not carefully drawn with due regard to the practice existing at the time of the passing of the Acts. Most of the old procedural statutes were eventually repealed by the Statute Law Revision Acts of 1879, 1881 and 1883, and the rest were codified into the new Rules of 1883, as will be described *infra*.

²⁰⁵ The dates were: December, 1875; February, 1876; June, 1876; December, 1876; May, 1877; June, 1877; November, 1878; March, 1879; December, 1879; April, 1880; May, 1880; May, 1883.

²⁰⁶ Some of these were the Appellate Jurisdiction Act, 1876 (39 & 40 Vict., c. 59), the Matrimonial Causes Act, 1878 (41 & 42 Vict., c. 19), the Summary Jurisdiction Act, 1879 (42 & 43 Vict., c. 49), and the Judicature Act, 1881 (44 & 45 Vict., c. 68). With these may be classed the repealing statutes which cleared the air of most of the cloud of old procedure: the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict., c. 59), the Statute

more important were the many great reforms in substantive law carried out in those historic years, under the leadership of two such tireless and far-seeing statesmen as Lord Selborne and Lord Cairns. Among them were the Married Women's Property Acts of 1874 and 1882,²⁰⁷ the Bills of Sale Acts of 1878 and 1882²⁰⁸ and Contingent Remainder and the Mortgage Acts of 1877,²⁰⁹ the Employers' Liability Act of 1880,²¹⁰ the Conveyancing Act of 1881,²¹¹ the Settled Land Act and the Bills of Exchange Act of 1882,²¹² and the Bankruptcy Act of 1883.²¹³ This flood of enactments, all of the character that touched every busy lawyer in his daily practice, added to the troubles with which he was beset by the puzzles in the new procedure.

Needless to say, the net result of this combination of disturbing elements was that costs mounted up aggressively, and gradually there arose a public outcry against the expense of litigation. The Judicature Acts seemed to be defeating their own ends.²¹⁴ In a leading article addressed to the Council of Judges, the *TIMES* called upon them to "endeavor to see whether it is not possible to prevent by a few judicious changes in procedure the waste and muddling away of suitors' money that goes on out of court," and added: "They could not do better than employ their moral influence in favor of reforms the necessity of which is attested as much by the complaints of lawyers that they are idle as by the murmurs of suitors that they are fleeced."²¹⁵ Lord Justice

Law Revision and Civil Procedure Act, 1881 (44 & 45 Vict., c. 68), and the Statute Law Revision Act, 1883 (46 & 47 Vict., c. 49).

²⁰⁷ 37 & 38 Vict., c. 50, and 45 & 46 Vict., c. 75.

²⁰⁸ 41 & 42 Vict., c. 31, and 45 & 46 Vict., c. 43.

²⁰⁹ 40 & 41 Vict., c. 33, and c. 34.

²¹⁰ 43 & 44 Vict., c. 42.

²¹¹ 44 & 45 Vict., c. 41.

²¹² 45 & 46 Vict., c. 38, and c. 61.

²¹³ 46 & 47 Vict., c. 52. Other statutes of great practical importance were the Real Property Limitation Act, 1874 (37 & 38 Vict., c. 57), the Trade Unions Act, 1876 (39 & 40 Vict., c. 22), the Bankers' Books Evidence Act, 1879 (42 & 43 Vict., c. 11), the Solicitors' Remuneration Act and the Newspaper Libels Act, 1881 (44 & 45 Vict., c. 44 and c. 60), and the Patents Act, 1883 (46 & 47 Vict., c. 57).

²¹⁴ In a debate in the House of Commons on August 11, 1883, the Solicitor-General, Sir Farrer Herschell (later Lord Chancellor) admitted the failure of the Judicature Acts in point of economy.

²¹⁵ December 1, 1880. Commenting on this and similar articles, the *LAW TIMES* remarked (70 L. T. 74, December 4, 1880): "It will be remarkable

Bramwell, of the trenchant pen, in a letter to the *Times*, attacked the English system of itemizing costs instead of charging them in a lump sum. "There is something wrong somewhere," he said. "The thing has got into a wrong groove. The system is wrong. . . . The obvious tendency of this practice is to multiply items and augment costs."²¹⁶ Some pointed to the abuse of interlocutory privileges as the source of the evil; others to the uncodified state of the rules of practice,²¹⁷ and a large party were in favor of the total abolition of pleadings in all actions.²¹⁸ But the trouble was a complication of disorders, and merely local treatment was recognized to be futile.

At length, at the end of 1880, there was a way opened (to use the Quaker phrase) by which Lord Selborne, then lately become once more the occupant of the woolsack, was able to set in motion a train of events whose consequences brought on the remedy. On September 17, 1880, Sir Fitzroy Kelly, the Chief Baron of the Exchequer, and on November 20, Sir Alexander Cockburn, the Chief Justice of the Queen's Bench, died. It had been impossible in 1873 to sweep away all distinctions between the three old Common Law Courts, partly because of the personal considerations arising out of the life tenure of the Chief Baron and the two Chief Justices. But now that factor was eliminated, Lord Selborne at once seized the opportunity to complete the work of unification he had begun eight years before. He

if the constant attention which the most influential journals devote to legal subjects does not bring about the necessary reforms in our procedure."

²¹⁶ The letter is reprinted in 25 *SOLICITORS' JOURNAL*, 341 (March 5, 1881). On this point the same journal said (May 7, 1881, p. 503): "The apothecary's bill kind of system which at present prevails is a most miserable and unsatisfactory system, but it is difficult to suggest any wholly satisfactory principle."

²¹⁷ In a letter addressed to Baron Pollock, Mr. (now Sir) Mackenzie D. Chalmers made a number of suggestions for steps to effect reductions in costs, one of which was: "That the statutes, orders and rules of court which regulated civil procedure at the time the Judicature Acts were passed should be expressly repealed, and such of their provisions as may still be required should be incorporated in the Judicature Acts and Rules." The letter is printed in 70 *LAW TIMES*, 20 (November 13, 1880). This course was so obviously necessary that shortly thereafter Mr. Chalmers, together with Mr. (now Sir) Courtenay P. Ilbert, was engaged in the drafting of the Statute Law Revision Acts of 1881 and 1883, and the incorporation of unrepealed statutes into the Rules followed soon after. See note 244, *infra*.

²¹⁸ See 25 *SOLICITORS' JOURNAL*, 503 (May 7, 1881): "Ought Pleadings to be Abolished?" The *LAW TIMES* was the only legal journal actually favoring such a drastic measure.

called together a Council of all the Judges²¹⁹ which met on November 27 and 29, and he caused them, against a strong minority which held tenaciously to all the old names and dignities, to pass a recommendation that the three Common Law Divisions of the High Court—the Queen's Bench, Common Pleas, and Exchequer—should be merged into one, to be called the Queen's Bench and presided over by Lord Coleridge, the surviving Chief Justice then in the Common Pleas. On December 16, the Privy Council issued an Order in Council upon the report of the judges,²²⁰ giving legal effect to their recommendation, and on February 26, 1881, the Order coming into operation, the names of Common Pleas and Exchequer disappeared from the judicature of England.

This outward change in the common law side of the High Court required corresponding changes to be made in its internal administration and procedure, and Lord Selborne, with characteristic enterprise, determined to make it the occasion for a general investigation of the complaints that were making themselves so insistently heard on every side, with a view to introducing any alterations necessary in the system of civil procedure. The Rule Committee of Judges then serving, under the Act of 1876, contained no practicing lawyers and its powers were limited within the confines of the Judicature Acts, so he considered it was not the body most suitable for seeking out the causes of dissatisfaction. On January 7, 1881, he addressed a letter to Lord Coleridge, who shared his views and sympathies in legal matters to a remarkable degree, asking him to preside over a committee "to consider and report upon any changes which it may be desirable now to make in the practice, pleading or procedure of the High Court of Justice in connection with or consequent on the union of the Queen's Bench, Common Pleas and Exchequer Divisions,

²¹⁹ Under §75 of the Judicature Act, 1873. The Act stipulates that such a Council should be held once every year, but this has not been strictly observed. Including the meeting of 1880 the judges have not held a formal Council more than half-a-dozen times since 1873. Lord Chancellor Haldane said he "could conceive of no more futile proceeding. We should meet and it would come to nothing." (*Minutes of Evidence taken before the Royal Commission on Delay in the King's Bench Division, 1913, vol. II, p. 191.*)

²²⁰ As provided by §32 of the Judicature Act, 1873.

or otherwise; and also how far it may be expedient to limit in any respect the rights of appeal at present existing." With the Lord Chief Justice's assent, Lord Selborne associated with him on this board of inquiry ten judges and practitioners drawn from all departments of legal work. Two had served on the original Judicature Commission of 1869,—Lord Justice James, a strenuous reformer, and John Hollam, the most prominent solicitor in London. Lord Shand, a Scottish Judge, was asked to sit with the committee, which became known as the Lord Chancellor's Legal Procedure Committee, to give them the benefit of his knowledge of Scots procedure, a system known to be most efficient.²²¹ Besides these there were two more judges, four barristers and another solicitor.²²² As the Committee had no statutory powers or official standing, except the fact of the Lord Chancellor's appointment, it had no power itself to make any changes in the Rules; it was simply to recommend, in an advisory capacity, what changes should be made by those in authority.²²³ Contemporary opinion did not look for great things from it; it was taken for granted that its work would result merely in the addition of a few amendments to the Schedule of 1875, without attaining any real relief.²²⁴

But it set out at once to dig up the whole field with great energy and enthusiasm. Its meetings were frequent and long. Although its proceedings were confidential, rumors of its delib-

²²¹ Quite recently Lord Loreburn wrote to Mr. Justice Lurton who was working on the new Federal equity rules: "The Scottish system of pleading is, to my mind, the best." (26 HARVARD LAW REVIEW, 101.)

²²² They were Sir James Hannen, the President of the Probate Divorce and Admiralty Division; Mr. Justice (later Lord) Bowen; Sir Henry James, the Attorney-General (who refused the Lord Chancellorship in 1886 because of his opposition to Irish Home Rule); Sir Farrer Herschell, the Solicitor-General (later Lord Chancellor); J. C. (later Mr. Justice) Mathew, and R. T. Reid (later Lord Chancellor Loreburn), to represent the Junior Bar; and Charles Harrison, the official solicitor. The Lord Chancellor's Secretary, Mr. (now Sir) Kenneth Muir Mackenzie, acted as Secretary to the Committee.

²²³ Lord Coleridge and Sir James Hannen were *ex-officio* members of the Rule Committee; Sir Kenneth Muir Mackenzie was also Secretary to that Committee. Otherwise there was no connection between the two.

²²⁴ 70 LAW TIMES, 217 (January 29, 1881): "The labours of the committee now sitting to consider the cost of litigation are not expected to be protracted, and new rules, as the result of their deliberation, will probably be issued in the course of next month."

erations leaked out at odd times during the next few months and their character gave rise to the most eager speculation upon the probable result of its findings. It became known that there was a strong feeling in the Committee that pleadings should be altogether abolished, and this report aroused in legal circles discussions more spirited than any since 1873.²²⁵ It was, in fact, true. Lord Justice James had, even in the days of the 1869 Commission, urged the abandonment of pleadings, and now he was ardently supported by Mr. Justice Mathew, a judge intolerant of technicalities who believed that all he needed was to see the parties before him to decide their controversy.²²⁶ Another influence strongly felt in the Committee was that of Lord Shand. He believed strongly in the advantages of the Scottish procedure, in which the issues between the parties are framed not by the contending pleaders but by an officer of the court itself. With his support Mr. Justice Bowen invented what has become known as the "omnibus summons"—a notice by which both parties are brought before a master, soon after appearance has been entered, to receive directions governing the entire future conduct of the action, down to trial—and convinced the Committee of its virtues. It was accepted as a necessary complement to the absence of pleadings. Then on to the topics of chamber work and discovery the Committee proceeded with equal originality, and after them considered in turn the methods of trial, the granting of new trials, the disposition of appeals, and the aggravating subject of costs, coming in every instance to definite conclusions which were embodied, with its reasons, in the Report unanimously signed which it sent to Lord Selborne.

²²⁵ Most people were shocked by the news. In February the Incorporated Law Society submitted to the Committee a resolution opposing such an idea. The legal journals printed many sarcastic references to it. It seemed to win some favor, however, for it was said in 16 *LAW JOURNAL*, 137 (March 26, 1881): "There are many forms of action in which pleadings are absolutely thrown away, and there are some few in which they are an economy. What is required is to separate the two."

²²⁶ He was appointed to the Queen's Bench early in March, 1881, without ever having taken silk. In 1895 he succeeded in establishing a separate List of commercial causes over which he presided. In this List he swept away written pleadings and technicalities of every sort, coming straight to the point of every dispute and bringing the Court into high favor with the London merchants who needed it.

This Report was anxiously looked for by the legal community, but although it was presented in May of 1881 it was not made public for nearly five months. During that time the Lord Chancellor submitted the Report to all the judges of the Supreme Court who had not been members of his Procedure Committee, in order to obtain from them confidential expressions of opinion on the subject-matter of the sweeping recommendations it contained. Their opinions have not been published but it is understood they were by no means a chorus of praise.²²⁷ By October they were all in the Lord Chancellor's hands, and the Report was duly given to the public.²²⁸ It was found to confine itself exclusively to procedure in the new Queen's Bench Division, not venturing to trespass upon Chancery ground. In twenty-six Resolutions it stated its findings under the Lord Chancellor's order of reference, making in every one of them bold suggestions for reforms at every stage of common law procedure. Its publication brought forward a veritable storm of criticism, both favorable and otherwise, but it was evident that progress in the right direction was at last being made.

In an introduction, the Report states that it aims to show the benefits of "a change in procedure which would enable the court, at an early stage of the litigation, to obtain control over the suit, and exercise a close supervision over the proceedings in the action." That is the keynote of the Report. In harmony with it are its most striking recommendations, described above, to discard pleadings, and to substitute for them mere notices of special matter and directions issued by a master under an omnibus summons. The next change it called for was in the freedom with which discovery could be obtained. The Committee believed that unnecessary discovery had been the greatest source of needless expense,²²⁹ and recommended that it should be strictly super-

²²⁷ 16 *LAW JOURNAL*, 582 (December 10, 1881): "It is no secret that there is great divergence on the bench in reference to the subject of the committee's report. The Lord Chancellor has asked for the criticism of the judges on the report and has been liberally supplied." And 72 *LAW TIMES*, 127 (December 24, 1881): "There is by no means unanimity [among the judges] as to the abolition of pleadings."

²²⁸ It was published October 3 and appears in full in 25 *SOLICITORS' JOURNAL*, 911 (October 15, 1881).

²²⁹ "It further appears to the Committee that much of the expense of

vised by the masters and allowed only by their leave. These three recommendations were the ones that most attracted the shafts of the critics. One of these wrote:

"Suitors are to be protected not only against one another, but against themselves, by a system of paternal care, directed by that preternatural sagacity, undeviating justice, and disinterested and energetic benevolence which are always supposed to characterize a despotism, but which have hitherto not been cordially accepted among this self-willed and troublesome race."²³⁰

And another caricatured the omnibus summons for directions, under which a master was, at the beginning of the action, to decide how it should be conducted, as:

"This wonderful summons, requiring from the master the sagacity and prescience of Mr. Micawber, at once to see and prescribe for all contingencies up to trial!"²³¹

The principal difference between the Committee and its censors lay in the interpretation of statistics. The Report pointed out that in the previous year only four *per cent.* of all actions begun in the Common Law Divisions had been carried through to trial, and that in sixty-one *per cent.* judgment had gone by default either of appearance or of defence; as to the remaining thirty-five *per cent.* unaccounted for, the Committee concluded that these had been dropped or settled out of court, and that in those cases either pleadings or discovery would have been unnecessary. Its opponents, on the other hand, argued that this thirty-five *per cent.* of actions withdrawn was exactly the virtue of the interlocutory work. "Discovery has frequently been effectual," they claimed, "in producing the settlement, by making the parties acquainted, before incurring the expense of a trial, with matters which, without it, they would have learned for the first time when they were before the court."²³² Perhaps both

litigation is now due to the power which the parties have of resorting to all the modes of procedure furnished by the Judicature Acts, without regard to the real requirements of the cases, which might often be dealt with as simply as summary proceedings before magistrates." (Report of the Committee.)

²³⁰ 26 SOLICITORS' JOURNAL, 106 (December 17, 1881).

²³¹ 27 SOLICITORS' JOURNAL, 2 (November 4, 1882).

²³² 26 SOLICITORS' JOURNAL, 69 (December 3, 1881).

sides claimed too much, but undoubtedly the use of interlocutory applications for discovery, *etc.*, had been abused.

Then there was a recommendation as to the mode of trial. The Committee's aim was to cut down expense and delay, so it devised a way of decreasing the number of jury trials by ruling that all trials should be non-jury except in cases where the master would allow a jury, on a special application under the summons for direction.²³³ This, and the succeeding resolutions as to new trials, were received with favor. The Committee suggested that the right to have a new trial be limited to certain cases, and that the application for a new trial should be by notice of motion, like the application for an appeal, instead of by an *ex parte* rule to show cause. Appeals, too, were considered, in seven Resolutions which cover appeals from the masters to the court and from the High Court to Divisional Courts and the Court of Appeal.²³⁴ Finally, as to costs, the Committee recommended a uniform scale of costs in contentious business in all Divisions of the High Court to stop the practice of bringing common law actions in the Chancery Division because higher costs were allowed there, and they recommended that an especially low scale of costs should be adopted for actions involving £200 or under, to discourage undue skirmishing for such small amounts.²³⁵ There were a few

²³³ This supervision was also intended to do away with this difficulty which had arisen: parties would frequently order put down in the jury list a case which, when it came on for trial, the judge would declare involved matters of account or similar complicated issues, on which a jury were absolutely unfit to pass; he would then order the case sent to a referee, or entered for a non-jury trial. As a consequence, all the counsel, parties and witnesses, would be sent away to wait until the case came on again in the list—a most inconvenient penalty to all concerned.

²³⁴ The substance of these Resolutions is to eliminate double appeals where formerly allowed, and to make the leave of a judge a prerequisite to appeal in every case.

²³⁵ From an American point of view one cannot help feeling that the English have not yet solved the question of how to keep down costs. Lord Justice Bramwell's plan to charge them in a lump sum rather than by an itemized bill would probably be a great advance. Perhaps the division of labor between solicitors and counsel is largely responsible for the evil. In a spirited letter in 72 LAW TIMES, 321 (March 4, 1882), G., describing himself as a solicitor in active practice for forty years, says: "The simple fact is that the ordinary and average London solicitor is content to be and remain a mere machine—a mere conduit pipe from client to counsel. Does he ever venture to draw any pleading or any affidavit or notice except those of stereotyped form? Dare he, without counsel, ever attend any judge or

resolutions on minor points which have been carried out with great benefit.²³⁶

Soon after the Report was published, the Council of the Incorporated Law Society, whose members constitute the branch of the profession in closest touch with the details of procedure, appointed a large committee to consider the Report and declare officially what was the opinion of the solicitors upon it as a body.²³⁷ The committee reported two months later, approving some of the Resolutions and condemning others.²³⁸ They approved of nearly all the recommendations except those giving an official of the court control over the conduct of an action. Especially did they condemn the proposed abolition of pleadings and the summons for directions that was to help supplant them. This opinion, without doubt, had some influence on the weight given to the Lord Chancellor's Committee's recommendations when they came to be considered by the Rule Committee of judges, for it was a carefully thought out and drafted document, and was adopted without a dissenting voice when presented to the Law Society at a large meeting on February 22, 1882.²³⁹

At about the same time, the Rule Committee was beginning the long series of discussions out of which finally emerged the new code of Rules of 1883. Lord Selborne had just appointed

master at chambers when anything has really to be argued? We know he never dreams of anything of the kind. He goes to counsel practically for everything. . . . You cannot effectually reduce the time or money employed in contentious business while the present system of procedure and the exclusive audience of counsel prevail. The sooner the now entirely needless distinction between counsel and solicitor, and their dual incumbrance to the suitor, cease, so much the better it will be, not only for the public, to whom it would be a great boon, but to lawyers themselves of either class."

²³⁶ For instance, that each action should be assigned to a particular master, who should have charge of all steps taken in it. Also that in the trial lists the jury and non-jury lists should be kept separately. The Resolution that shorthand notes of the proceedings in court should be taken has never, curiously enough, been followed.

²³⁷ The committee was appointed November 18, 1881, with forty London and thirteen country members, G. A. Crowder, chairman. The list of their names is given in 26 *SOLICITORS' JOURNAL*, 104.

²³⁸ Their report, dated January 30, 1882, appears in 26 *SOLICITORS' JOURNAL*, 245 (February 18, 1882).

²³⁹ The *SOLICITORS' JOURNAL* (26 S. J. 255, February 25, 1882), speaks of "the singular care and ability with which that report has been prepared, and the admirable constitution of the committee as representing all shades of opinion."

the new Committee under the Act of 1881²⁴⁰ and had submitted to them the Report of his Legal Procedure Committee, together with the opinions upon it he had received from the other judges. Although the new Committee was not composed of judges committed to the recommendations of Lord Coleridge and his associates, their verdict upon those recommendations was, on the whole, favorable,²⁴¹ and they prepared at once to go forward with the work of giving shape to the new regulations. The plan was to alter such parts of the old Rules as were affected by the new proposals, and to that end a rough draft of a set of new rules based on them was placed in the Committee's hands as a basis for argument.

Almost at the very outset, the rule-makers encountered a difficulty that brought their progress to a sharp halt. The foremost of the reforms included in the program was the abolition of pleadings. That was to be accomplished by providing for an indorsement of the plaintiff's claim on his writ, and for mere notices of special matter delivered in lieu of any formal defence or replication. The end to be attained sounded simple enough, but when it came to drafting a Rule which would be clear enough to cover every conceivable class of claim and defence, the Committee could make no satisfactory headway. It soon became obvious, in the arguments that centered about Order III, that in cases where the issues were numerous or complicated such a method of notices would result in a ragged disconnected kind of pleading entailing more expense than the old. At this juncture, Baron Pollock made the suggestion that there might be a different treatment provided for the simple cases than for the complicated ones, and he undertook to draft an Order on that principle.

²⁴⁰ §19 of the Judicature Act, 1881, made the Rule Committee consist of the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President of the Probate Divorce and Admiralty Division, and four judges of the Supreme Court named by the Lord Chancellor. The Act was signed in August, 1881, and at the beginning of January, 1882, Lord Selborne appointed Lord Justice Lindley, Baron Pollock, and Justices Manisty and Fry to be the four additional judges.

²⁴¹ 17 LAW JOURNAL, 147 (March 18, 1882): "The Rule Committee of the judges have decided to adopt in the main the recommendations of the committee over which Lord Coleridge presided, and nothing now remains but to settle the details and draft the rules."

He drew up a list of actions in which he considered the issue to be so clear that no more was needed than a claim and a denial; in actions "other than the enumerated actions" he proposed to allow written pleadings under a master's supervision. But upon closer inspection this solution proved equally illusory; it was impossible to predict what actions would resolve themselves into simple issues, or even that the simplest might not develop difficulties such as would render the absence of pleadings a hardship on the parties. The Committee then decided to take expert advice and called in G. Baugh Allen, the foremost pleader of the day, to help draft the troublesome Order. Allen pointed out how useless it would be to segregate actions into artificial classes; his idea was that the Order should merely contain a few brief words of admonition to the pleader on the beauties of brevity and should be supplemented by a copious supply of forms; these forms should cover a varied assortment of causes of action, and should be drafted in model style to serve as the standard to which pleadings should conform. By setting before the pleader such examples of what the Committee desired, he believed all misunderstanding as to what was brief and what was prolix would disappear. The Committee decided to take this channel as the only way clear of the rocks, and Allen was commissioned to draft the pleading Orders and the forms to accompany them, under the supervision of Sir Edward Fry, then a Chancery judge of extreme technical accuracy.²⁴² That is the story of the present English method of pleading by reference to the forms.

Naturally, all this took time, and the summer of 1882 was well on its way before the subject of pleading was satisfactorily disposed of, but although the profession were fretting under the delay and anxiety of waiting for changes which they knew would be great,²⁴³ the Committee proceeded slowly and carefully with the rest of its task. Instead of limiting it to the recommenda-

²⁴² Now the Rt. Hon. Sir Edward Fry, who, since his retirement from the bench in 1892, has achieved great distinction in various important international arbitrations. He sat from 1900 to 1912 as a member of the Permanent Court of Arbitration at The Hague.

²⁴³ 17 *LAW JOURNAL*, 401 (July 29, 1882): "It is evident that the ordinary duties of the judges do not admit of their performing those quasi-legislative duties with the despatch which is desirable." And nine months later (18

tions of the Legal Procedure Committee, Lord Selborne decided it should complete, in the course of its work, the codification which was so badly needed. The draftsmen who were engaged on the repealing act which became the Statute Law Revision Act of 1883²⁴⁴ were instructed to include only such parts of the old procedural measures as were unmistakably obsolete; all others they turned over to the Rule Committee to incorporate into the codified Rules, in more or less altered form. With this added material the Committee completely transformed the old Rules of 1875, working slowly on from Order to Order for over a year. Different members of the Committee made themselves responsible for the Orders with which they were most familiar, and each one was worked out separately. The actual drafting was done by many hands. Each member of the Committee would bring in the sections in which he had interested himself, and these would then be carefully revised and edited by the Lord Chancellor and his Secretary²⁴⁵ to bring them into harmony with each other, especially in the matter of forms of expression. Lord Selborne

LAW JOURNAL, 217, April 21, 1883): "Much of the unsatisfactory state of legal business at the present time may be traced to the injurious influence of rules from which great changes were expected, which were always coming but have never come."

²⁴⁴ Mackenzie D. Chalmers and Courtenay P. Ilbert, the Parliamentary draftsmen. The following reference to the work appears in Sir Courtenay Ilbert: *Legislative Methods and Forms* (London, 1901), p. 69: "Soon after the Judicature Acts came into operation, the Statute Law Committee took into consideration the question how far previous enactments were superseded by them or might be superseded by rules of court made under them. Accordingly they instructed Mr. Arthur Wilson to prepare a report on the subject, and in 1878 he submitted to the committee a report on the statutes relating to civil procedure and courts. (Parl. Papers, 1878, lxiii.) The work begun by him was afterwards continued by Mr. Chalmers and the present writer, and resulted in the passing of the Statute Law Revision and Civil Procedure Acts of 1881 and 1883, and in the framing of a large number of rules of court which took the place of previous enactments relating to procedure."

²⁴⁵ Mr. (now Sir) Kenneth Muir Mackenzie, who, as Secretary to Lord Selborne, had been Secretary to the Procedure Committee of 1881 and was Secretary to the Rule Committee as well. In 1884 he was made Permanent Secretary to the Lord Chancellor and his presence, in that capacity, on the Rule Committee from then on to the present day has been a most important factor in giving to the work of the Committee the continuity it would be otherwise difficult for a constantly changing body to attain. Much of the actual drafting of new Rules is done by his hand, and all of it is done under his supervision. In his work on the Rules of 1883 he was assisted by his brother, Mr. M. J. Muir Mackenzie, who in 1905 became one of the Official Referees of the High Court.

himself did an enormous amount of work in studying the details of every section of the Rules and forms, to assure himself that every possible defect and inconsistency had been cleared away. His "work on the Rule Committee was more complete and exhaustive than that of anyone else; he was personally responsible for every word. There was literally not one word which he had not read and considered."²⁴⁶ Until the end of 1882 the Committee met almost every week to discuss the results as they came to hand; from January, 1883, on, meetings became even more frequent, until in June the Committee sat almost every day in order to complete the undertaking before the Long Vacation was upon them.

In March, 1883, an event occurred which deprived the Committee of the services of one of its most valuable members. Sir George Jessel, the Master of the Rolls, died suddenly on the twenty-first of March. He had taken a most active part in the Committee's deliberations, particularly on the Orders affecting chancery procedure, and had been especially helpful in giving the new Rules a practical and workable aspect which would commend them to the practitioner as well as to zealots for reform. "No judge did more to carry out the principles and purpose of the Judicature Acts, and to regulate their operation by the rules of common sense and practical convenience."²⁴⁷ His place was filled by Lord Justice Brett, who succeeded him in the custody of the Rolls.

At length on July 9, 1883, after many months of painstaking work, the eight members of the Rule Committee put their signatures to the new Rules, and on the following day the Rules were laid on the table in both Houses of Parliament, in accordance with the Act.²⁴⁸ Ten days later they were, for the first time, circulated among the profession. They were timed to come into operation on October 24, the ending of the Long Vacation, and immediately a great cry went up that there would not be sufficient time to examine the new Rules and consider them before

²⁴⁶ Note by Sir Kenneth Muir Mackenzie, at p. 93 of vol. II of Lord Selborne's "Memorials, Personal and Political." (London, 1898.)

²⁴⁷ 27 SOLICITORS' JOURNAL, 342 (March 24, 1883).

²⁴⁸ §25 of the Judicature Act, 1875.

they took effect, as the Long Vacation was then only a fortnight off. The protest assumed definite shape when Sir Hardinge Giffard²⁴⁹ moved in the House of Commons for an address to the Crown praying that an Order in Council should be made annulling the Rules, because of the lack of time for consideration, and both branches of the profession sent official resolutions favoring the motion. It was the first time the procedure had been resorted to since the Judicature Act established it, and the debate on August 11 brought out some interesting opinions on the constitutional aspects of the Rule Committee as a law-making body.²⁵⁰ The Government did not oppose the motion as a party measure, but despite the non-party vote the motion was lost, the feeling in the House being that it was unwise for the Executive to interfere with the Judicature Rules unless the judges attempted to effect some grave constitutional change under the color of rules of practice. After that the active members of the Inns of Court and the Law Societies settled down to study the new Rules and Forms, and many a man's vacation in the summer of 1883 was made weary by the companionship of that bulky volume. On October 24, they went into effect, and have since been the basis of the Supreme Court practice, frequently amended but never revised.

(To be Continued.)

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²⁴⁹ Then in Opposition. Later Lord Chancellor Halsbury, when the Conservatives took office in June, 1885.

²⁵⁰ Reported in Hansard, vol. 283, 3rd series, pp. 146-187.